No. 93-518

In the Supreme Court of the United States

OCTOBER TERM, 1993

FLORENCE DOLAN, PETITIONER

v.

CITY OF TIGARD

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the City of Tigard may, without payment of compensation, require a store owner to dedicate approximately ten percent of her land for a greenway for flood control and bicycle transportation as a condition of a permit to replace her store with a much larger store, where the dedication would mitigate the adverse effects of increased storm water runoff and traffic congestion caused by commercial development.

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INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a city's attempt to mitigate ill effects of urban growth through conditions imposed on permits to expand commercial development. The United States administers and funds many programs under federal statutes that further their regulatory objectives through conditions on the permit applicant's use of its property. See, *e.g.*, 33 C.F.R. 325.4(a) (in issuing permits under Section 404 of the Clean Water Act, 33 U.S.C. 1344, Army Corps of Engineers may impose conditions "directly related to the impacts of the proposal, appropriate to the scope and degree of those impacts, and reasonably enforceable"). Some federal programs rely on permit conditions, including dedications of public access, to ensure that development projects do not impair environmental quality and other aspects of the public interest. See 33 C.F.R. 320.4(g)(3) and (o), 325.4(a) (Corps of Engineers permitting authority includes safeguarding public access to navigable waters); 36 C.F.R. 212.9(b) (Forest

Service may obtain easements for trails over non-federal lands "by purchase, condemnation, donation, or as a reciprocal for permits"); see also *United States* v. *Alaska*, 112 S. Ct. 1606 (1992) (discussing conditions, including waiver of property rights, on permits under Section 10 of Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1151).

In addition, federal statutes encourage local governments to develop comprehensive transportation plans utilizing bicycle and pedestrian facilities in order to reduce pollution. Under the 1990 Clean Air Act Amendments, "nonattainment" areas must prepare State Implementation Plans (SIPs) that demonstrate how air quality standards will be attained and maintained. 42 U.S.C. 7410; see 42 U.S.C. 7501-7515 (Supp. III 1991). Federally-assisted highway and transit projects (as well as major projects not receiving federal funds) cannot be approved unless they conform to the applicable SIP. 42 U.S.C. 7506(c). Transportation control measures that are likely to improve air quality in nonattainment areas are identified in 42 U.S.C. 7408(f)(1)(A). Subsections (ix), (x), (xiv), and (xv) all involve bicycle or pedestrian facilities. In addition, the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (1991), encourages local decisionmaking and development of nonpolluting forms of transportation. See, *e.g.*, 23 U.S.C. 134, 149.

STATEMENT

1. Petitioner owns a plumbing and electric supply store located on Main Street in the Central Business District of the City of Tigard, Oregon. The store occupies approximately 9700 sq. ft. on the eastern side of a 1.67-acre parcel (roughly 72,500 sq. ft.). Fanno Creek flows through the southwest corner of the lot and along its western boundary. The area within the creek's 100-year floodplain is virtually unusable for commercial development due to the year-round flow of the creek. Tigard's Comprehensive Plan designates the Fanno Creek floodplain to be included

as part of the city's greenway system. J.A. 3 (Site Plan Map); Pet. App. G8, G39.

Petitioner and her late husband applied to the city for a permit to engage in a multi-phase redevelopment of the site. Petitioner plans to build a 17,600 sq. ft. store on the southwestern side of the site, and to pave a 39-space parking lot. The existing building would be razed in sections corresponding to progress on the new building. In the second phase of development, petitioner proposes to build an additional structure on the northeastern side of the site for complementary businesses, and to provide more parking. The precise nature of this second phase has not been specified. Pet. App. G9, G31.

Petitioner's proposed expansion and intended uses are generally consistent with the zoning in the Central Business District. Owners of property in that District must comply with a 15% open space and landscaping requirement, which limits total site coverage (including all structures and paved parking) to 85% of the parcel. Pet. App. G16-G17. Petitioner's parcel also lies within an "Action Area Overlay Zone," which imposes an additional layer of zoning to implement the city's Comprehensive Plan for areas with a mixture of intensive land use. Those additional regulations are designed to provide for projected transportation and public facility needs in the Action Area. *Id.* at G17-G21. They include a requirement for the provision of "efficient, convenient and continuous pedestrian and bicycle transit circulation systems," as identified in the Comprehensive Plan. *Id.* at G18. Tigard adopted its land-use measures under state laws that require, among other things, conservation of open space, protection of streams, and development of a safe, multi-modal transportation system. *Id.* at H1-K1; Br. in Opp. App. B1-C13.

2. The city granted petitioner's permit application subject to certain conditions specified by the city's Community Development Code. which serves to implement the comprehensive plan. At issue in this case is a permit condition requiring petitioner to dedicate to the city an

area of approximately 7000 sq. ft., roughly 10% of the lot. Pet. App. G43. A portion of the dedicated land is in the Fanno Creek floodplain, and the remainder is a 15-foot-wide strip next to the floodplain to be used for a pedestrian/bicycle pathway. In accordance with city practice and at petitioner's request, the city determined that she may rely on the dedicated property to meet the 15% open space and landscaping requirement, and the city will bear the cost of maintaining a landscaped buffer between the dedicated area and the new store. *Id.* at G28-G29, G44-G45.[1]

The city's permit decision also requires petitioner to relocate the "footprint" of the new building outside the dedicated area to accommodate the pathway and a five-foot relocation of the floodplain bank by the city. Pet. App. G13, G28, G43-G44. Although the decision suggests that petitioner will be required to construct the pathway, *id.* at G28, the permit conditions themselves impose no such requirement, see *id.* at G43-G48. Petitioner must also pay a county-wide "traffic impact fee" for transportation improvements, and a "fee-in-lieu" of on-site water quality facilities, which will be used to purchase regional facilities to treat surface water runoff. *Id.* at G13-G15, G47-G48.

3. Petitioner sought a variance from the City Development Code provision that required the dedication, arguing that it effects an unconstitutional taking of property without compensation. Pet. App. G23. The City Council denied the variance, *id.* at G1-G3, based on findings and

[1] Petitioner asserts (Br. 11, 33 n.13) that the permit requires her to transfer a fee interest in the dedicated property. The language of the permit, however, requires only the dedication of the land "as Greenway" (Pet. App. G43), which presumably could be satisfied by an easement. The Community Development Code lists "[d]edication of easements" as a possible condition for site development permits. Br. in Opp. App. B16. The city's position, as we understand it, is that the condition here contemplates an easement rather than a fee interest. That view appears consistent with Oregon law. See *Portland Baseball Club* v. *City of Portland*, 18 P.2d 811, 812 (Ore. 1933).

conclusions set forth in a lengthy decision by the City Planning Commission, *id.* at G4-G48.

The Commission found the pathway portion of the dedication to be reasonably related to petitioner's proposal to intensify development, which would increase traffic and congestion on nearby collector and arterial streets. Pet. App. G24. The Commission noted that commercial expansion of a retail sales facility would be expected to generate a weekday average of 53.21 additional trips per 1000 square feet, or roughly 435 additional trips per day for petitioner's proposed expansion. *Id.* at G15. It further noted that the Comprehensive Plan specifically discusses the need for a pathway system to address traffic congestion. The Commission observed that "as the city grows, more people may rely on the pathways for utilitarian as well as recreational purposes." *Id.* at G25. The city previously had determined that traffic in the downtown area was so congested that it adversely affected emergency response, Tigard Area Comprehensive Pedestrian/Bicycle Pathway Plan, vol. 1, at 241-42, vol. 2, at 48, 54, and it had identified a pathway along Fanno Creek as a critical portion of the overall system. The city found that the plan will reduce hazards to pedestrians and bicyclists, provide children with safe access to schools, and otherwise reduce traffic congestion. *Ibid.*, Addendum (Tigard Res. No. 74). If traffic that would otherwise use the pathway is forced onto city streets, the Commission observed, "pedestrian and bicycle safety will be lessened." Pet. App. G27.

The city likewise found the floodplain portion of the dedication to be reasonably related to the expected increase in surface water runoff (Pet. App. G37, G40):

> The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to

> an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes.
>
> * * * * *
>
> [The planned] channel improvements, here and elsewhere along the creek, would be expected to improve the channel's ability to transmit stormwater flows thereby reducing the 100-year flood elevation and reducing the possibility of floodwater damages and threats to public safety.

The Commission specifically found that additional storm water runoff from commercial development at petitioner's site and elsewhere in the drainage basin will increase the flow within the Creek and adversely affect the 100-year flood elevation. Pet. App. G40. The city's Master Drainage Plan documents previous flooding along Fanno Creek (Drainage Plan at 2-7 to 2-8, 4-2 to 4-6, Figure 4.1), and notes that flood problems near Main Street are "extensive and severe." *Id.* at 4-5. The Comprehensive Plan describes the city's goals in regulating development in and adjacent to floodplains to avoid hazards to the public and downstream properties. Pet. App. G38. Based on information gathered from the U.S. Army Corps of Engineers, the Plan emphasizes the importance of retaining a vegetative buffer along streams and drainageways "to reduce runoff and flood damage and provide erosion and siltation control." *Id.* at J1. In furtherance of those goals, the Master Drainage Plan recommends improvements to Fanno Creek, including channel widening and slope stabilization, to increase flow efficiency and reduce the risk of flooding. *Id.* at G38-G39.

4. Petitioner appealed the city's variance denial, arguing that *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), requires a detailed demonstration by the city of a close nexus between anticipated adverse effects of the proposed expansion and the permit condition. The

state Land Use Board of Appeals (Pet. App. D1-D18), the Oregon Court of Appeals (*id.* at C1-C10), and the Supreme Court of Oregon (*id.* at A1-A30) rejected petitioner's constitutional challenge, finding the permit condition to be reasonably related to the proposed development.

SUMMARY OF ARGUMENT

1. The city's interests in alleviating traffic congestion and flooding are ample bases for land-use regulation. The city may consider the cumulative effects of development and need not demonstrate that petitioner's proposed expansion, standing alone, would have consequences sufficiently grave to require remediation. Given the scope of petitioner's proposed development, the city could reasonably conclude that its contribution to the city's overall traffic and drainage problems would be significant. The city could therefore have denied petitioner's permit application outright without effecting a compensable taking of property.

2. Under *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), even where a governmental body may deny a permit application entirely, it may not condition the grant of the permit on the relinquishment of a property interest if the exaction bears no reasonable relationship to the public need or burden to which the proposed development contributes. Unlike the exaction at issue in *Nollan*, however, the dedication requirement here is directly related to the projected impacts of petitioner's proposed expansion. Courts have uniformly upheld the requirement of street and sidewalk dedications as a condition of subdivision approval, recognizing that a constitutionally sufficient nexus exists between the expected increase in traffic resulting from a proposed development and the dedication of land for construction of additional transportation routes. Similarly, the requirement that petitioner dedicate an easement for drainage improvements bears an obvious relationship to the increased runoff anticipated from her enlarged store and paved parking lot.

The city need not demonstrate a precise mathematical fit between the exaction and the impact of the proposed development. The city may rely upon the cumulative impact of the type of activity proposed by petitioner, as well as the overall relationship of the exaction to petitioner's property and development. Here, the permit conditions, which further the same flood-control and transportation purposes as an outright prohibition would have done, "are not so clearly excessive as to belie their purported character." *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 (1989). Indeed, petitioner has not suggested an alternative, less intrusive condition that would adequately alleviate the burdens on traffic and drainage that the expansion of her business can be expected to cause.

3. Petitioner objects that non-floodplain property owners in downtown Tigard who propose significant commercial development will not be required to make dedications similar to that at issue here. Petitioner has failed to demonstrate, however, that she has been singled out in a manner that effects a compensable taking, since the conditions are tailored to the particular features of her property. The existence of a comprehensive, long-term city plan does not undermine the conclusion that the dedication required of petitioner is reasonably related to the impacts of her proposed development.

ARGUMENT

This Court's Takings Clause jurisprudence represents an effort to strike an appropriate balance between competing considerations. On the one hand, "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 835-836 n.4 (1987) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). On the other hand, regulation of economic affairs is pervasive; virtually all such regulation adversely affects some

members of the community; and "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2894 (1992) (quoting *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922)).

"Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another," *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986), or that every diminution in property values caused by governmental action constitutes a compensable taking. Persons who believe that their economic interests have been unfairly slighted must ordinarily seek redress through the political process. This Court's decisions thus have sought to identify those instances in which the costs of government are *so* unfairly concentrated on particular persons as to require compensation. And, consistent with the rule in constitutional litigation generally, the burden is on the person challenging the governmental action to establish a violation of the Takings Clause. See, *e.g.*, *Lucas*, 112 S. Ct. at 2893 n.6.

Although the Court has "generally eschewed any set formula for determining how far is too far, preferring to engage in essentially ad hoc, factual inquiries," *Lucas*, 112 S. Ct. at 2893 (internal quotation marks, brackets, and ellipsis omitted), it has "described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint." *Ibid.* Governmental action is generally regarded as a per se taking if it effects a "permanent physical occupation" of private property, *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-440 (1982); *Nollan*, 483 U.S. at 831-832, or denies the owner all economically beneficial use of land that is consistent with applicable nuisance law and comparable principles. *Lucas*, 112 S. Ct. at 2893-2895. The Court has

also stated that land-use regulation that does not effect a physical invasion of property or deprive its owner of all beneficial use will nonetheless constitute a taking if it "does not substantially advance legitimate state interests." *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980).

In *Nollan* this Court held that the government's appropriation of a public easement across privately owned land would ordinarily constitute a "permanent physical occupation" of property and thus a compensable taking. 483 U.S. at 831. The Court also made clear, however, that under some circumstances, a governmental entity may require a landowner to furnish such an easement, without compensation, as a condition of a land-use permit. *Id.* at 836. Such a condition may validly be imposed, the Court held, if (1) the nature of the proposed use is such that the government's outright denial of the permit would not have effected a taking, *ibid.*, and (2) "the permit condition serves the same governmental purpose as the [hypothetical] development ban." *Id.* at 837.[2] The development condition in the present case satisfies both these requirements.

I. THE CITY OF TIGARD CONSTITUTIONALLY COULD HAVE CHOSEN TO REJECT PETITIONER'S DEVELOPMENT PROPOSAL BASED ON ITS ANTICIPATED CONTRIBUTIONS TO THE CITY'S TRAFFIC AND DRAINAGE PROBLEMS

Petitioner devotes the bulk of her brief to the contention that there is not a sufficient nexus between the permit condition and her proposed development. She also appears to contend, however, that an outright denial of her permit

[2] The Court explained that the government's "power to forbid construction * * * must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." 483 U.S. at 836. Because that test is satisfied in this case, there is no need to consider the circumstances under which conditions may validly be imposed even if the permit could not be denied outright without payment of compensation.

application would have effected a compensable taking. See, *e.g.*, Pet. Br. 23, 32.[3] Petitioner does not argue that the denial would have amounted to a physical invasion of her property; nor does she assert that the proposed expansion of her store is necessary to allow the use of her land in an economically beneficial manner.[4] Rather, petitioner questions whether denial of her permit would have "substantially advanced" any legitimate governmental interest. Petitioner's argument is without merit.

A. A broad range of governmental purposes—including scenic zoning, landmark preservation, and residential zoning—constitute "legitimate state interests" under the Takings Clause. *Nollan*, 483 U.S. at 835 (citing cases). In light of the extensive studies and analysis that support Tigard's Master Drainage Plan and Comprehensive Community Code—which document the burden imposed on the Fanno Creek floodplain by extensive commercial development—it cannot be seriously doubted that a denial of development permits for parcels adjacent to Fanno Creek would be reasonably related to flood protection. See *Pope* v. *City of Atlanta*, 249 S.E.2d 16, 19-20 (Ga. 1978) (city plan limiting impervious structures in floodplain does not effect a taking), cert. denied, 440 U.S. 936 (1979); *Maple Leaf*

[3] Indeed, it might be said that in substance this is petitioner's *primary* argument. Petitioner asserts (Br. 19) that *Nollan* involved "facts analogous to the facts of the instant case," and claims (Br. 23) that "the city did not demonstrate the existence of the essential nexus required by *Nollan*." She makes no real effort to argue, however, that the consideration that proved decisive in *Nollan* has any application to the present case. She does not contend, that is, that the exaction is logically unrelated to the problems that will be caused by her development. Her argument is instead that the proposed development will not cause traffic and drainage problems in the first place.

[4] If such a challenge were made, the inquiry would focus on the potential for economically viable use of the tract as a whole, not on the portion precluded from further development. See *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2290 (1993); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978) (same).

Inv., Inc. v. *Department of Ecology*, 565 P.2d 1162, 1164-1166 (Wash. 1977) (ordinance limiting development in floodway does not effect a taking). Likewise, the city's comprehensive pathway plan establishes that downtown Tigard is plagued by serious traffic congestion spawned by commercial development and other urban growth. Denial of permission to engage in further significant development would advance the legitimate governmental interest in providing for a safe and efficient transportation system. *Agins*, 447 U.S. at 260-263 (zoning that curbs development to address ill effects of urbanization does not effect a taking); *Euclid* v. *Ambler Co.*, 272 U.S. 365, 394-395 (1926) (same). Petitioner would benefit from a moratorium on commercial development in Tigard as a result of reduced flood risks and traffic congestion, and she would thus enjoy a reciprocity of advantage that would further weigh against a finding of a taking. See *Lucas*, 112 S. Ct. at 2894; *Agins*, 447 U.S. at 262; *Mahon*, 260 U.S. at 415.[5]

[5] This Court has stated that takings analysis "entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations." *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980); see, *e.g.*, *Concrete Pipe*, 113 S. Ct. at 2290-2292. The first two of these factors have been made the subject of categorical treatment: governmental action generally is a per se taking if its "character" is that of a permanent physical occupation of real property or if its "economic impact" is to deprive the owner of all beneficial use of his land that is inconsistent with applicable nuisance law and comparable principles. Outright denial of a permit application would not have effected a taking under either of those two tests. It instead would have constituted an exercise of traditional land-use regulation that allowed petitioner to maintain her ongoing commercial use of the property. See *Concrete Pipe*, 113 S. Ct. at 2291. Nor has petitioner shown that prohibition of her proposed construction would have impermissibly "interfere[d] with reasonable investment-backed expectations." The power of governmental bodies to limit development in order to prevent traffic congestion or decrease the risk of flooding is well-established, and this is not a case in which a sudden change in the City's regulatory standards has undermined genuine reliance interests or otherwise subjected petitioner to unfair surprise. Cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1014 (1984).

B. Petitioner does not contest the legitimacy of the city's interests in flood and traffic control. She contends instead that the city has failed to demonstrate a significant connection between her own development proposal and the problems affecting the community. It is well established, however, that governmental bodies may legitimately fashion comprehensive plans designed to deal with the cumulative effects of development throughout a given geographic area. The propriety of the density restrictions at issue in *Agins*, or of the residential zoning challenged in *Euclid*, did not depend upon a showing that nonconforming development on a single tract would substantially alter the character of the surrounding neighborhood.[6] And the Court in *Nollan* observed that "the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede [legitimate governmental] purposes." 483 U.S. at 835-836. The city in this case therefore properly considered whether the proposed expansion of petitioner's store, in conjunction with other development, could be expected to exacerbate the community's traffic and drainage problems.[7]

[6] Indeed, the Court in *Euclid* observed that "the coming of one apartment house is followed by others" and emphasized the cumulative effects of this form of development. 272 U.S. at 394.

[7] Petitioner argues (Br. 27) that "[t]he city's code required dedication of land for a greenway and pedestrian pathway without regard to any impacts, adverse or otherwise, of the development." The City 's site development review process applies, however, only to "new developments and major modifications of existing developments," Br. in Opp. App. B1; a lesser expansion of petitioner's store therefore would not have triggered dedication requirements. Petitioner was also given an opportunity through the variance process to demonstrate that the impacts of her proposed development would be insubstantial. Cf. *Williamson Planning Comm 'n* v. *Hamilton Bank*, 473 U.S. 172, 191

Petitioner's proposed expansion would nearly double the size of her store and add a 39-space paved parking lot. Petitioner also proposes a significant future development for complementary businesses and additional parking that will substantially increase the impervious surface area of the parcel. Pet. App. G9, G31. In denying petitioner's request for a variance, the city found that this proposal would "increase the amount of storm water runoff from the site to Fanno Creek" and that "[t]he Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation." *Id.* at G37. The city reasonably concluded that the increased stormwater runoff from proposed development "to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes." *Ibid.* The Planning Commission noted as well that commercial expansion of a retail sales facility would be expected to generate a weekday average of 53.21 additional trips per 1000 square feet, or (in the case of petitioner's proposed development) roughly 435 additional trips per day. *Id.* at G15.

These findings establish that commercial growth has had a cumulative and serious adverse impact on the Fanno Creek drainage basin, and that petitioner's proposed development would further burden the floodplain. In addition, the Commission's findings amply support its conclusion that "the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets." Pet. App. G24. Accordingly, consistent with the Constitution, the city might simply have denied petitioner's application for a development permit.

(1985) (takings claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question").

II. THE DEDICATION REQUIRED AS A CONDITION OF THE PERMIT IS REASONABLY FASHIONED TO ADDRESS THE PROPOSED DEVELOPMENT

Because the city could have denied petitioner a permit to engage in significant commercial expansion, it may also grant petitioner a permit subject to conditions that have a suitable nexus to the proposed development.

A. 1. The *Nollan* Court observed that "the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." 483 U.S. at 836. It determined, however, that the Coastal Commission could not constitutionally require an uncompensated easement along the beach on the Nollans' property because such an easement would do nothing to mitigate the visual and psychological barrier between the road and the beach that would be exacerbated by the Nollans' new house. The flaw was not that the required easement was unnecessarily large, or that the Nollans' contribution to the overall adverse impact of beachfront development was too small, but that the character of the permit condition was disconnected from the adverse effect of the proposed development. The Court concluded that the "evident constitutional propriety" of a permit condition disappears "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. The Court explained that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but an 'out-and-out plan of extortion.'" *Ibid.* (citation omitted).

The Court in *Nollan* found this relatedness requirement to be reflected in a substantial body of takings jurisprudence. 483 U.S. at 839-840 (citing cases). It also finds support in analogous settings. The Court has recognized that receipt of government benefits, par-

ticipation in government programs, permission to use government facilities, or freedom from governmentally imposed burdens (*e.g.*, taxation) may be conditioned upon compliance with requirements that the government could not impose unilaterally. The Court has consistently required, however, that if the condition is to be valid, there must exist some nexus between the condition and the purposes of the underlying government program.

Thus, "the government's power as an employer to make hiring and firing decisions on the basis of what its employees * * * say has a much greater scope than its power to regulate expression by the general public." *Rankin* v. *McPherson*, 483 U.S. 378, 395 (1987) (Scalia, J., dissenting) (citing *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968)). Such decisions must be justified, however, by reference to the government's interests *as an employer*, see *Pickering*, 391 U.S. at 568; *United Public Workers* v. *Mitchell*, 330 U.S. 75, 101 (1947); the government may not use the employment relationship as leverage to evade constitutional restrictions in its pursuit of goals that are unconnected to that relationship. Similarly, Congress, in exercising its spending power, may condition receipt of federal funds on compliance with conditions that could not be imposed directly, see *South Dakota* v. *Dole*, 483 U.S. 203, 206-207 (1987), so long as those conditions serve to further the purposes for which the funds are spent. *Id.* at 207-209; *id.* at 213-214 (O'Connor, J., dissenting); *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 285 (1958); see also *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 591 (1937);[8] *Stephenson* v. *Binford*, 287 U.S. 251, 274-275 (1932) (sustaining state regulation of trucking rates and distinguishing prior case invalidating a state scheme that "was in no real sense a regulation of the use of the public highways," but instead had "furnished a purely unrelated occasion for imposing the unconstitutional condition").[9]

[8] In *Steward Machine*, the Court sustained federal tax credits for employer contributions to state unemployment compensation funds meeting federal statutory prerequisites, explaining (301 U.S. at 591):

> It is one thing to impose a [federal] tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or to any other end legitimately national. * * * It is quite another thing to say that a tax will be abated upon the doing of an act that will satisfy the fiscal need, the tax and the alternative being approximate equivalents.

2. The permit condition in this case is directly related to the adverse effects of commercial development like petitioner's proposed expansion, and accordingly serves the same purposes as outright denial of the permit would have served. As a result, the regulatory scheme, including the permit condition, is exactly what it purports to be—"a valid regulation of land use"—not a means of "extortion." *Nollan*, 483 U.S. at 837.

The greenway dedication will allow the city to make necessary improvements in the floodplain, provide for an alternate transportation route, and prevent use of the specified area in a manner inconsistent with the city's public-safety goals. There is a reasonable connection between the nature of the required dedication and the governmental interests to be served. Indeed, street and sidewalk dedication requirements imposed as conditions to residential subdivision approval constitute the *prototypical* development exactions, against which the propriety of other exactions is commonly measured. "[Z]oning regulations requiring subdividers * * * to

[9] See generally Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1415, 1458-1468 (1989); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321, 350-352 (1935). Several commentators have analyzed *Nollan* within the framework of the Court's "unconstitutional conditions" cases. See, *e.g.*, Sullivan, 102 Harv. L. Rev. at 1463-1464; Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1610 n.51 (1988); Epstein, *Takings: Descent and Resurrection*, 1987 Sup. Ct. Rev. 1, 34-37. See also *Parks* v. *Watson*, 716 F.2d 646, 650-653 (9th Cir. 1983) (analyzing propriety of development permit condition by reference to unconstitutional conditions jurisprudence).

dedicate certain areas to public streets, are in accord with our constitutional traditions because the proposed property use would otherwise be the cause of excessive congestion." *Pennell* v. *San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).[10] The courts have thus consistently recognized that a constitutionally sufficient nexus exists between a proposed development that can be expected to generate traffic and the dedication of land for construction of additional transportation routes.[11] The pathway dedication at issue here fits comfortably within that tradition.[12]

The fact that the greenway dedication may serve governmental purposes in addition to alleviation of flooding and traffic congestion does not invalidate the otherwise sufficient nexus. Members of the public might stop to rest

[10] See also Berger, *Conscripting Private Resources to Meet Urban Needs: The Statutory and Constitutional Validity of Affordable Housing Impact Fees in New York*, 20 Fordham Urban L. J. 911, 914-915 (1993) (street and sidewalk dedications are commonly accepted as consistent with the Takings Clause); Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DePaul L. Rev. 635, 639 (1990) (same); Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L. J. 1119, 1132 (1964) ("Judicial reaction uniformly has been that the imposition of street dedication and improvement conditions does not constitute a taking").

[11] See also *Leroy Land Dev.* v. *Tahoe Regional Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991) (permit conditions compelling acquisition of land for open space and other off-site mitigation have sufficient nexus to erosion control under *Nollan* because developed property's impervious surfaces aggravate erosion).

[12] The city has concluded that creation of a safe and convenient pedestrian and bicycle pathway system as an alternate means of transportation could offset some of the traffic demand caused by development in the central business district. That conclusion is plainly reasonable and is in accord with the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914, and the 1990 Clean Air Act Amendments, Pub. L. No. 101-549, 104 Stat. 2399, which recognize pedestrian and bicycle facilities as necessary components of any strategy to reduce traffic congestion and air pollution. *E.g.*, 42 U.S.C. 7408(f)(1)(A)(ix)-(x) and (xiv)-(xv); 23 U.S.C. 149, 217.

on the dedicated property and make other incidental use thereof. Although it is unclear whether the physical characteristics of the property would invite such use, the permit condition would presumably allow for it. And to the extent that the pathway is utilized for recreational activities by persons who would not, in its absence, be driving automobiles or riding bicycles on nearby streets, it will serve purposes beyond alleviation of the city's traffic problems and related safety concerns associated with bicycles in the commercial district. But just as the Takings Clause is not a mere "pleading requirement," *Nollan*, 483 U.S. at 841, neither is it a model land-use code to be used to flyspeck development permits. Street and sidewalk dedications imposed as conditions to residential subdivision approval to alleviate congestion are commonly accepted as consistent with the Takings Clause, see pp. 17-18, *supra*, even though streets and sidewalks are available (as a matter both of practice and of constitutional law) for purposes having nothing to do with alleviating traffic burdens or promoting safety.[13] Similarly, the requirement that States establish a higher drinking age undoubtedly serves ends other than increasing the safety of federally funded highways, yet the Court held it to be "directly related," *South Dakota* v. *Dole*, 483 U.S. at 208, to the effectuation of that governmental purpose.

In short, the record demonstrates that the city's justifications for the permit conditions are not a subterfuge. It is not "an exercise in cleverness and imagination," *Nollan*, 483 U.S. at 841, but simple common sense, to conclude that greatly expanded commercial development like that proposed by petitioner will lead to increased storm water runoff and traffic congestion. And the city's

[13] See, *e.g.*, *Hague* v. *C.I.O.*, 307 U.S. 496, 515 (1939) (plurality opinion) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."); *United States* v. *Grace*, 461 U.S. 171, 177 (1983).

explanation of its attempt to address those serious problems is not an empty articulation to fulfill a "pleading requirement," *ibid.*, but instead the very essence of workaday municipal planning.[14]

B. 1. Petitioner nevertheless contends that the permit condition is unconstitutional. In her view, *Nollan* requires that permit conditions be subjected to "heightened scrutiny" (Br. 30), and that they can be justified only upon a factual showing by the government that they have a "substantial" nexus (and are "proportionate") to the specific (and "quantifiable") incremental harms that are directly attributable to the proposed development. See generally Resp. Br. 19-29. That contention finds no support in *Nollan* itself. There, the Court accepted, for purposes of discussion, the Coastal Commission's test of how close a "fit" is required—namely, whether the condition "is reasonably related to the public need or burden that the [proposed development] creates or to which it contributes"—because the Court found that the

[14] Petitioner also contends (Br. 18, 24) that the dedication condition is improper because it duplicates monetary assessments that respond to the same impacts of the proposed expansion. See Pet. App. G14-G15. If the monetary exactions were intended as full recompense by the property owner for the full public costs and consequences of its development, the legitimacy of the challenged permit condition as a valid land-use regulation might well be called into question. Cf. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 162 (1980) (county's appropriation of interest earned on private interpleader fund was a taking; interest could not be regarded as a fee for government services, since "any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to" a separate statutory provision). Petitioner raised that issue for the first time in this Court, however, and she therefore failed to carry her burden of establishing that the fees—imposed, it should be noted, by governmental bodies other than the city, see Pet. App. G14—were intended to constitute a fully sufficient means of addressing the same impacts that are addressed by the dedication condition.

condition in *Nollan* did not meet "even the most untailored standards." 483 U.S. at 838.[15]

Significantly, moreover, the Court has eschewed the sort of heightened scrutiny advocated by petitioner in the analogous contexts discussed above. See pp. 16-17, *supra*. Thus, although the administration of a government program may not be employed as a subterfuge for imposing otherwise unconstitutional conditions having "no relation," *Stephenson*, 287 U.S. at 275, to the purposes of the underlying regulatory scheme, the Court has not required that the condition imposed be the best or only method of achieving the government's legitimate purposes, or that it be narrowly tailored or directly proportionate to harms specifically attributable to the person affected by the program. Rather, the Court has afforded governmental bodies considerable latitude to impose conditions reasonably related to the underlying program. See *Mitchell*, 330 U.S. at 101 (federal employees may be barred from political activity "reasonably deemed by Congress to interfere with the efficiency of the public service"); *South Dakota* v. *Dole*, 483 U.S. at 208-209 ("the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel"); *Ivanhoe Irrigation Dist.*, 357 U.S. at 285 ("reasonable conditions relevant to the federal interest in the project and to the over-all objectives thereof"); *Steward Machine Co.*, 301 U.S. at 591 (condition improper if "unrelated" to fiscal need served by tax or to other legitimate goal); *Stephenson*, 287 U.S. at 274-275 (measure invalid where its purported regulatory purpose "furnished

[15] The Court in *Nollan* also stated that so long as the permit might have been denied entirely, it could have been granted subject to the condition that the Nollans "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." 483 U.S. at 836. That unqualified statement suggests that the Court viewed the nexus requirement primarily as one of logical relatedness that entails no fine comparisons between the extent of a project's impacts and the intrusiveness of the permit condition.

a purely unrelated occasion for imposing the unconstitutional condition"); see also *Nashville, C. & St. L. Ry.* v. *Waters*, 294 U.S. 405, 429 (1935) ("some reasonable relation to the evils to be eradicated").[16]

2. In urging some version of heightened scrutiny, petitioner places considerable emphasis on the Court's observation in *Nollan* that land-use regulation must "substantially advance" legitimate governmental interests. 483 U.S. at 834, 841; see Pet. Br. 20-21.[17] Petitioner errs in several respects.

First, the question whether the city's actions "substantially advance" legitimate governmental interests must be addressed in the context of the regulatory scheme as a whole. As we have explained above (see pp. 11-12, *supra*), the city's comprehensive plans and codes substantially advance its legitimate interests in flood and traffic control. The city constitutionally could have denied a permit altogether under those provisions, because petitioner's proposed development was expected to increase water runoff and traffic congestion. Thus, to the extent "substantial advance[ment]" is independently necessary with respect to each application of the city's general codes, that standard would have been met here by an outright denial of a permit. It should follow that if the dedication condition included in the permit meaningfully "serves the same governmental purpose" and "further[s]

[16] See also *Parks* v. *Watson*, 716 F.2d at 652 ("Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred.").

[17] Petitioner also repeatedly recites (Br. 20, 22, 30) the Court's reference in *Nollan* to the "essential nexus" between the purpose served by the condition and the purpose served by a prohibition against development. See 483 U.S. at 837. That phrase in *Nollan*, however, merely served to emphasize that the *existence* of such a nexus is necessary; it did not suggest that the condition (or prohibition) itself must be "essential," in the sense of serving some compelling governmental interest.

the [same] end" (*Nollan*, 483 U.S. at 837) as an outright denial of a permit, then the regulatory scheme continues to "substantially advance" legitimate governmental interests as applied to her property in the form of a permit condition. Contrary to petitioner's further contention (Br. 24), the Fifth Amendment does not impose the burden of proof on a government agency to justify each application of its regulatory scheme to a particular parcel (whether in the form of a permit denial or a permit condition). See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 487 n.16 (1987).

Second, it does not appear that the Court has used the word "substantial" in this setting in a manner that is distinct in substance from "reasonable." As a historical matter, this Court's decisions regarding land-use restrictions have employed the word "substantial" to mean "not insubstantial," "not illusory," or "more than negligible." Cf. *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1912-1913 (1992) (discussing "substantial nexus" test under Commerce Clause).[18] In *Nectow* v. *Cambridge*, 277 U.S. 183 (1928), for example, the Court stated that "a court should not set aside the determination of public officers in such a matter unless it is clear that their action 'has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Id.* at 187-188 (quoting *Euclid* v. *Ambler Co.*, 272 U.S. at 395);[19] see also *Lucas*, 112

[18] *Nollan* itself suggests that the two words are largely interchangeable in this setting. Thus, after quoting *Agins* for the proposition that a land-use measure does not effect a taking if it "substantially advances legitimate state interests" (447 U.S. at 260), the Court quoted the observation in *Penn Central* (438 U.S. at 127) that a use restriction may constitute a taking "if not reasonably necessary to the effectuation of a substantial governmental purpose." See 483 U.S. at 834.

[19] *Nollan* suggested that a land-use regulation that satisfies due process or equal protection standards because "the State '*could rationally have decided*' that the measure adopted might achieve the

S. Ct. at 2897 (quoting *Penn Central*, 438 U.S. at 125 ("where State 'reasonably concludes that health, safety, morals, or general welfare would be promoted by prohibiting particular contemplated uses of land,' compensation need not accompany prohibition").[20]

State's objective" (quoting *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)) might nevertheless be invalid under the Takings Clause because it fails to "substantially advance" a legitimate state purpose (quoting *Agins*, 447 U.S. at 260). 483 U.S. at 834-835 n.3. Other decisions suggest, however, that the due process and takings standards are essentially the same in this respect (although, under *Lucas*, the Takings Clause of course requires a further inquiry into economic impact). *Agins*' observation that land-use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests," 447 U.S. at 260, was supported by citation to *Nectow*. But *Nectow* involved a due process challenge rather than a takings claim, 277 U.S. at 185, and, as noted in the text, the Court in *Nectow* used the phrase "substantial relation" in contradistinction to "a mere arbitrary or irrational exercise of power." And since *Nollan*, the Court has reiterated that where "due process arguments are unavailing, 'it would be surprising indeed to discover' the challenged statute nonetheless violated the Takings Clause." *Concrete Pipe*, 113 S. Ct. at 2289 (quoting *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986)).

There is no need in this case, however, to determine what differences there may be between the Due Process and Takings Clause standards in this respect. The Oregon Supreme Court held that the permit condition was "reasonably related" to petitioner's proposed development, Pet. App. A13-A16, not merely that the city had satisfied what footnote 3 of *Nollan* suggests might be a more relaxed standard of whether the city "rationally could have believed" that there was a nexus between the condition and the development. Whether the appropriate nexus is expressed as a "reasonable" or substantial" relationship may not be important so long as it is clear that the sort of heightened scrutiny petitioner urges is not required and that judicial review of legislative and administrative determinations in this setting involves a significant degree of deference. Cf. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415-416 (1971). In our view, the word "reasonable" more aptly captures these principles.

[20] In some contexts other than land-use regulation, however, the Court has sometimes employed the word "substantial" to make clear that the Constitution requires a more demanding test than rational-basis review. See, *e.g.*, *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)

Thus, the requirement of a nexus between a permit condition and a permit denial does not serve to introduce into the permit condition context new principles that are not present in other areas of takings jurisprudence— such as a requirement of heightened justification, proportionality or equivalence of benefit and burden, and a shifting to the government of the burden of proof. See, *e.g.*, *Penn Central*, 438 U.S. at 125-128. As this Court has said, "the Just Compensation Clause 'has never been read to require the . . . courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received' in determining whether a 'taking' has occurred." *Sperry*, 493 U.S. at 61 n.7 (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 n.21 (1987)).[21] The nexus requirement serves, rather, to ensure that the statutory scheme actually constitutes valid land-use regulation (rather than an occasion for obtaining an unrelated exaction), and thereby to identify and invalidate measures that are "in no real sense a regulation of the use of [land]." *Stephenson*, 287 U.S. at 275; see *Nollan*, 483 U.S. at 837 & n.5, 839, 841.

("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 272-273 (1979) (contrasting standard of review for gender-based classifications with ordinary rational-basis review); *Central Hudson Gas & Elec. Corp.* v. *Public Serv. Comm'n*, 447 U.S. 557, 564 (1980) ("The State must assert a substantial interest to be achieved by restrictions on commercial speech."); see also *Amicus* Br. American Farm Bureau Federation, et al. at 26-27. This Court has not suggested that restrictions on the use of land are plausibly analogized to gender-based classifications or to restrictions on commercial speech.

[21] In many cases, the anticipated harms (both immediate and long-term) of development cannot be readily or precisely quantified, and it is therefore necessary to build in a measure of protection against the risk of future harm. The Fifth Amendment does not require the public, rather than the landowner whose development would alter the status quo, to assume that risk and its associated costs; nor does it prevent governmental agencies from exercising their expert predictive judgment about the consequences of proposed development.

This is not to say that concepts of proportionality or the degree of relatedness are irrelevant in this setting. For if a permit condition is wholly out of proportion or fair relation to the proposed development and the circumstances of the property on which the condition is imposed, a question again would arise as to whether the measure actually has the purpose it ostensibly serves. Here, however, the permit conditions adopted by the city "are not so clearly excessive as to belie their purported character." *Sperry*, 493 U.S. at 62; see *id.* at 62 n.8; cf. *Pittsburgh* v. *ALCO Parking Corp.*, 417 U.S. 369, 375-376 (1974); *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 253 (1987). The record amply supports the city's conclusion regarding the likely impacts of petitioner's proposed development and petitioner did not invoke applicable administrative procedures to proffer any contrary evidence or to show that the permit condition bears no reasonable relationship to her proposed development. See pp. 13-14, *supra*. The required dedication was reasonably fashioned to address those impacts and was measured by the extent of floodplain on petitioner's property. Compare *Hancock* v. *City of Muskogee*, 250 U.S. 454, 459 (1919); cf. *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 625-629 (1981).[22] Petitioner has not suggested an alternative, less intrusive condition that would adequately alleviate the burdens on traffic and drainage that the expansion of her business can be expected to cause.

[22] Petitioner's existing commercial use of her property of course already contributes to flooding problems and traffic congestion in the vicinity, and it may be appropriate to take such existing impacts into account in assessing the overall reasonableness of a dedication condition imposed as part of a permit allowing further development. The fact that the dedication requirement at issue here is not triggered unless the landowner undertakes a substantial change in the premises does not render it impermissible for the city to assess the cumulative burdens imposed by petitioner at that time. Cf. *Nordlinger* v. *Hahn*, 112 S. Ct. 2326 (1992).

III. THE DEDICATION REQUIREMENTS DO NOT UNFAIRLY CONCENTRATE EXCESSIVE BURDENS UPON PETITIONER

Petitioner places substantial emphasis on the fact that non-floodplain property owners in downtown Tigard who propose significant commercial development will not be required to make dedications similar to the one at issue here. The existence of marked disparities is relevant to takings analysis, since "[o]ne of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Nollan*, 483 U.S. at 835-836 n.4 (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). Petitioner has failed to demonstrate, however, that she has been singled out in a manner so unfair as to effect a compensable taking.

A. 1. Insofar as the actual floodplain portion of the dedication is concerned, petitioner's argument is clearly unavailing. The City's Master Drainage Plan (pp. 5-13 to 5-15, 8-11) contains the reasonable, unrebutted finding that owners (like petitioner) whose tracts abut Fanno Creek impose special burdens on the city's storm management system, and will reap unique benefits from improvements to the floodplain. That finding provides an ample basis for imposing on those landowners conditions that are not required for development of other property within the city's Central Business District. Owners of non-floodplain property in Tigard might well be asked to make other dedications unique to the characteristics of their property to offset the adverse impacts caused by their development. Furthermore, the adverse impact on petitioner is mitigated by the fact that she may count the entire area of the dedication against the 15% open-space and landscaping requirement that is generally applicable to commercial property in the vicinity.

Petitioner's "equal treatment" argument might at first appear to have greater force with respect to the pathway

portion of the dedication, since her proposed development seems unlikely to create greater traffic burdens than would a similar expansion across the street. We believe, however, that the pathway dedication requirement is also constitutional. In the first place, petitioner will realize offsetting advantages from the bikepath that are not available to businesses across the street, because her property will be immediately adjacent to the bikepath and will benefit from the additional access and amenities it affords.

Furthermore, the reason for the city's decision to impose the pathway dedication on a particular group of landowners is apparent: the projected pathway will run along the floodplain, and the dedication of easements by landowners across the street would not help to effectuate the city's Comprehensive Plan. This Court faced an analogous situation in *Penn Central*, where the takings claim was based in part upon the fact that the Landmarks Preservation Law restricted development only on properties having certain characteristics and did "not impose identical or similar restrictions on all structures located in particular physical communities." 438 U.S. at 133. The Court responded that "[i]t is, of course, true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.'" *Ibid.* In concluding that the burden imposed on Penn Central was not so disproportionate as to require compensation, the Court emphasized that substantial numbers of landowners were subject to the statutory restrictions and that Penn Central derived at least some reciprocal benefit from the law. *Id.* at 134-135. The same is true of the pathway portion of the dedication condition at issue here, because it corresponds to the special location and characteristics of petitioner's property and gives rise to a reciprocity of advantage among all persons (including petitioner) whose property abuts the floodplain.

2. In determining the degree of the disparity, the dedication condition must be viewed against the backdrop of other, generally applicable land-use regulations imposed by the city. In accordance with city practice and at petitioner's specific request, the city determined that petitioner may use the dedicated strip to meet landscaping and open space requirements, see Pet. App. G17, thereby relieving her of the expense of the landscaping and freeing up other portions of the parcel for commercial development. See *id.* at G28-G29. Similarly, in sustaining the prohibition against commercial development of air space at issue in *Penn Central*, the Court found it telling that the property owners could continue to make use of transferable air space credits at other parcels. 438 U.S. at 138. While petitioner cannot interfere with the public's use of the dedicated greenway, she may "transfer" her ability to use that strip of land to other portions of the site by applying it against the open-space requirement. The exactions at issue here therefore do not prevent petitioner from developing as great a percentage of her property as can the non-floodplain owners in the Central Business District. Cf. *American Dredging Co.* v. *New Jersey*, 404 A.2d 42, 43-44 (N.J. Super. 1979) (prohibition on filling wetlands portion of parcel with dredge spoils does not effect a taking because, inter alia, wetlands serve to meet open-space zoning requirement).

3. Thus, while the Takings Clause limits the government's freedom to single out particular individuals to absorb the costs of public improvements, see *Nollan*, 483 U.S. at 835 n.4, not every deviation from equality effects a compensable taking. As *Penn Central* makes clear, the breadth of the affected class and the degree of disparity in treatment among landowners are crucial in determining the propriety of the dedication requirement.[23] Assuming

[23] In assessing the extent of the burden placed on petitioner and other landowners similarly situated, it also is important to consider their reasonable investment-backed expectations. See n. 5, *supra*. Those landowners could not have anticipated that they would be able to

that the city might properly have denied petitioner's permit application outright—and that the exactions are reasonably fashioned to address the proposed expansion and the character of the affected property—the dedication condition in this case is not rendered unconstitutional by the fact that non-floodplain landowners are not subject to the same condition.

B. Finally, petitioner suggests (Br. 18, 35) that because the city has been planning for floodplain improvements and a comprehensive pathway system for some time, it is unreasonable to conclude that her proposed expansion actually precipitated the decision to condition the permit approval on the dedication. That the city has attempted to anticipate the adverse impacts of urban growth does not diminish petitioner's contribution to those problems. Nor does it diminish the benefits that she will realize as a result of the dedication and similar dedications by others, or the benefits that her enterprise has enjoyed from floodplain improvements by the city in the past. Comprehensive floodplain and transportation planning is precisely what one would expect from a well managed municipality. A city should not be precluded from acquiring greenway easements as an aspect of a permit process triggered by landowners who seek to add further and special burdens to the floodplain and traffic congestion through significant commercial expansion.

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make substantial economic use of the portions of their parcels within or immediately adjacent the floodplain. The interest in and expectation of excluding others from the premises is further affected by the fact that the tracts at issue are used for commercial purposes. Petitioner's property is open to the public, compare *PruneYard*, 447 U.S. at 80-85, and its profitability is directly linked to her ability to expand development and attract customers.

CONCLUSION

The judgment of the Supreme Court of Oregon should be affirmed.

Respectfully submitted.

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